

Supreme Court, U.S.
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In The
Supreme Court of the United States

EL PASO PROPERTIES, INC.,

Petitioner,

v.

SIERRA CLUB AND
MINERAL POLICY CENTER,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Roosevelt Tunnel is a six-mile long drainage tunnel constructed a century ago to drain groundwater in the Cripple Creek mining district in central Colorado. The Roosevelt Tunnel portal is adjacent to Cripple Creek, a tributary of the Arkansas River. Petitioner El Paso Properties, Inc., formerly El Paso Gold Mines, Inc. (El Paso), owns property including an inactive gold mine and a collapsed mine shaft which intersects the Roosevelt Tunnel over 1,200 feet below ground at a location approximately two and one-half miles from the tunnel portal. The Roosevelt Tunnel underlies and connects to many properties in the Cripple Creek mining district, including a portion of Colorado's largest active gold mine. El Paso has never conducted mining or other operations on its property, nor does it hold any interest in the Roosevelt Tunnel.

In a new and expansive interpretation of the Clean Water Act (CWA), the Tenth Circuit held that simple property ownership may create liability under CWA Section 402, which requires a permit for "the discharge of any pollutant by any person" to navigable waters from a point source. Shifting the CWA's focus from the active conduct suggested by the term "discharge" to mere property ownership, the Tenth Circuit concluded metaphorically that "if you own the leaky 'faucet,' you are responsible for its 'drips.'" The Tenth Circuit's ruling creates potential CWA liability for a new and very large class of property owners, including many governments, without regard to whether the landowner engaged in any affirmative conduct affecting water quality.

QUESTIONS PRESENTED – Continued

The questions presented, which are of great national importance, are:

1. Whether mere ownership of property, abetted by the hydrologic cycle but without any past or present affirmative act by the owner, constitutes the "discharge" of a pollutant to navigable waters from a point source, thereby subjecting a passive property owner to CWA Section 402 liability.
2. Whether a passive landowner that has never conducted any operations on its property can presently be in "continuous or intermittent violation" of the CWA [*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 64 (1987)] for purposes of federal subject matter jurisdiction under the CWA Section 505(a).

RULES 29.6 AND 14.1 STATEMENT

Petitioner, El Paso Properties, Inc., formerly known as El Paso Gold Mines, Inc., formally changed its corporate name on September 28, 2004 by filing the proper paperwork with the Colorado Secretary of State. El Paso Properties, Inc. is a privately held corporation organized and operating in good standing under the laws of the State of Colorado. Petitioner has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

Respondents are the non-profit environmental groups Sierra Club and Mineral Policy Center.

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PETITION FOR WRIT OF CERTIORARI

Petitioner El Paso Properties, Inc. (El Paso) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The final opinion of the court of appeals and order granting Respondents' petition for panel rehearing (App., *infra*, 1-34 & 102-103) will not be published in the Federal Reporter. The original opinion of the court of appeals is reported at 421 F.3d 1133 (10th Cir. 2005). The opinion of the district court granting summary judgment (App., *infra*, 35-70) is not reported. The final judgments entered by the district court (App., *infra*, 71-74) are not reported. The opinion of the district court denying El Paso's motion to dismiss or stay the proceedings under the doctrines of abstention and primary jurisdiction is reported at 198 F. Supp. 2d 1265 (D. Colo. 2002). The opinion of the Colorado Administrative Law Judge (App., *infra*, 75-101) is not reported.

JURISDICTION

The opinion of the court of appeals originally entered on August 24, 2005. Respondents' motion for panel rehearing and rehearing *en banc* was granted on October 21, 2005 for the sole purpose of correcting dates. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions pertinent to this case are set forth at App., *infra*, 104-105.

STATEMENT

There are two important public policy questions presented in this case: (1) whether passive owners of abandoned mine properties may be subject to liability under the Clean Water Act; and (2) whether Clean Water Act citizen suits may be brought against such landowners.

A. Undisputed Relevant Facts

El Paso purchased about 100 acres of property and mineral rights in the Cripple Creek mining district of Colorado in 1968, four years prior to passage of the Clean Water Act (CWA). The mining district contains many underground tunnels, shafts, drains, adits, laterals, and mine workings. El Paso's property includes portions of an old abandoned mine as well as a collapsed mine shaft known as the El Paso shaft. A series of underground mine workings connect the El Paso mine and shaft to other mining properties in the vicinity.

The Roosevelt Tunnel is a six-mile long drainage tunnel that was constructed by a consortium of mining companies in the first decade of the twentieth century to drain groundwater in the mining district. Some of El Paso's property overlies a portion of the Roosevelt Tunnel, although the Tunnel's portal is located approximately two

and one-half miles down gradient from El Paso's property. Multiple properties overlie, connect to, and are drained by the Roosevelt Tunnel.

El Paso and its shareholders did not construct the El Paso shaft, the El Paso Mine or the Roosevelt Tunnel. El Paso has never conducted mining operations or held a mining or exploration permit. El Paso's sole asset is the property that is the subject of this litigation. Respondents allege in this CWA citizen suit that El Paso is discharging pollutants from the Roosevelt Tunnel portal into navigable waters without a permit. Respondents seek to prove that, as a result of the natural hydrologic cycle, small amounts of zinc and manganese are transported from the El Paso shaft into the Roosevelt Tunnel and thence into navigable waters from the Roosevelt Tunnel portal.

B. The Statutory and Regulatory Scheme

Section 402 of the CWA, 33 U.S.C. § 1342, establishes a national pollutant discharge elimination system (NPDES) and directs the Environmental Protection Agency (EPA) to issue permits for the discharge of pollutants. Section 404 of the CWA, 33 U.S.C. § 1344, establishes a permitting program for the discharge of dredged or fill material, which is generally administered by the U.S. Army Corps of Engineers. States are authorized to assume primary responsibility for administering the NPDES program under the oversight of the EPA. Colorado has established an EPA-approved NPDES program. COLO. REV. STAT. §§ 25-8-501 *et seq.* Under the Colorado program, the Water Quality Control Division (WQCD) of the Colorado Department of